In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 293

UNITED STATES OF AMERICA, PETITIONER

v.

LANCE, INCORPORATED

No. 294

UNITED STATES OF AMERICA, PETITIONER

v.

LOVKNIT MANUFACTURING CO., INC.

PETITION FOR REHEARING OF ORDERS DENYING PETITIONS FOR WRITS OF CERTIORARI

The Solicitor General, on behalf of the United States of America, prays that this Court grant rehearing of its orders of December 11, 1951, denying the petitions for writs of certiorari, and that writs of certiorari issue to review the judgments of the Courts of Appeals for the Fourth and Fifth Circuits in the above-entitled cases, as prayed for in the petitions filed August 30, 1951, herein.

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INDEX

CITATIONS

Page

Massey v. United States, 291 U.S. 608 2

Schriber-Schroth Co. v. Cleveland Trust Co., 305 U.S. 47 3

United States v. Sligh, 24(F)2 636 4

Weber v. Opera On Tour, Inc., 314 U.S., 615 6

28 U.S.C.A., Sec. 725 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 293

UNITED STATES OF AMERICA, PETITIONER

v.

LANCE, INCORPORATED, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

The petition for rehearing is based on the case of McMahon v. United States, decided November 5, 1951, subsequent to the filing of the petition for certiorari. The petition does not meet the requirements of paragraph 2 of Rule 33 of the Supreme Court for the following reasons:

The ground stated in the petition is not confined to intervening circumstances of substantial or controlling effect, as required by the Rule. *Massey v. United States, 291 U.S. 608.* In the Massey case the ground stated related to an intervening amendment to the Constitution of the United States.

Nor does the petition state other substantial grounds available to petitioner although not previously presented as required by the Rule. *Schriber-Schroth Co. v. Cleveland Trust Co. 305 U.S. 47.* In this case the ground stated for rehearing was that there was no possibility of a conflict of opinion between Circuits due to the concentration in one circuit of the industry involved in the case.

On page 3 of the petition for rehearing the petitioner quotes from the McMahon decision to the effect that under the Act involved in that case during the years before the statute was amended the limitation depended upon the event giving rise to the claims and not upon the rejection, and that later when the right to sue was broadened there was no indication of any change in the limitation contained in the older Act; and then the petitioner goes on to say that here the situation is the reverse and that the Walsh-Healey statute for eleven years was consistently construed and enforced on the *assumption* that the administrative determination of liability and not the violation itself give rise to the claim on which suit could be brought. There may have been such an assumption in the Labor Department but our position is that such assumption was groundless from the beginning. During the eleven years that such assumption was in effect there was no test in court of the assumption. Now that the assumption has been tested by the courts and found wanting we submit that the recital of such an assumption is not a basis for granting certiorari. In the quotation from the McMahon case the court is stating its own construction of the statute in that case and the attempt of the petitioner to put its assumption on a level with a decision of the Supreme Court is not to be seriously considered. The original Walsh-Healey Act did not say that

an administrative proceeding was a prerequisite to a suit in court and the Portal-to-Portal Act amending it as to the statute of limitations did not say so. Thus, the situation in this case is the same as in the McMahon case in this respect: In the McMahon case there is no indication in the amendment of any change in the limitation and in the Portal-to-Portal Act which amended the Walsh-Healey Act, there is no indication of any change as to the administrative hearing. In the Portal-to-Portal Act the length of the period of limitations was fixed but there was no reference to any administrative proceeding.

Counsel for the Labor Department and surely the Solicitor General are acquainted with the reason for the enactment of the Portal-to-Portal Act. We need study only the caption or preamble to the Act to conclude that certain regulations and interpretive bulletins of the Labor Department prompted it. If Congress by the Portal-to-Portal Act was trying to confine the activities of the Labor Department to a more timely period with respect to Walsh-Healey, Wage and Hour and Bacon-Davis cases, it is somewhat inconceivable to assume that its intention was to place it within the power of the department to indefinitely suspend the Statute. As was stated in *United States* v. *Sligh*, 24 F. (2) 636 (C.C.A. 10, 1928), it is never the policy of the law to construe statutes so as to put it within the power of a party to toll the Statute of Limitation when it is running against him. One purpose of the Portal-to-Portal Act was to make the period of limitation uniform, since in the absence of a federal Statute of Limitation as to a federal Statute, the applicable state Statute, if any, would apply. See 28 U.S.C.A. § 725. The Statutes of many states varied from six months to five years.

On page 4 of petitioner's brief, cases are cited to the effect that statutes of limitations are to be construed strictly in favor of the sovereign. This question was discussed in the original petition (p. 12) where two of the cases were cited that are now cited by the petitioner. In the original petition it was argued that a statute of limitations does not apply to the government unless the intent to make it apply is express or "clearly manifest." The three cases now cited by the petitioner add nothing to its former brief because two of them, the Wheless case and the Davis case were cited on page 12 of the original brief and the third case now cited, "Independent Coal & Coke Co. v. United States," adds nothing to the holding of the other two cases. The rule that statutes of limitation are to be construed strictly in favor of the sovereign was doubtless applied in this case when the court denied certiorari thereby holding that when the stated rule is applied it is clearly manifest that the statute was meant to apply to suits instituted by the United States under the Walsh-Healey Act. As was stated by Judge Sibley in the Lovknit Manufacturing Co. case, if the Statute does not apply to the government in Walsh-Healey cases there is none to whom it could apply. The contrary would be equivalent to saying that Congress did a vain thing in mentioning the Walsh-Healey Act in passing the Portal-to-Portal Act.

On page 4 of its brief the petitioner states that the remaining reason specified in the McMahon opinion was that the Act involved in that case should not be construed so as to give the claimants an option as to when they will start the period of limitation of an action against the United States. If the petitioner's contention should prevail, we would have the situation that is condemned in the McMahon

case because the petitioner could withhold institution of administrative proceedings for an indefinite time, the statute would not begin to run until the final determination of the administrative proceeding, and thus the petitioner would have control of the statute of limitations. As to the point that the government does not know of the violations, it has an opportunity to learn of them because it has a period of two years within which to make its investigation. According to the statute the government's knowledge has nothing to do with the matter because there is no mention of the government's knowledge of the violation in connection with the statute of limitations. Furthermore, the government after acquiring knowledge of the violations could still control the starting of the statute of limitations according to petitioner's contention because it could postpone indefinitely the administrative proceeding. There is, therefore, nothing in the Walsh-Healey Act that suggests any legislative intent different from the legislative intent in the McMahon situation.

On page 5 of petitioner's brief, petitioner states that the question left unresolved in the McMahon case is presented by one of the instant cases, that is the question "whether the statute of limitations is tolled" pending completion of the requisite administrative proceedings. This statement involves an assumption that the administrative proceedings are a prerequisite which we contend is not correct.

This question now attempted to be raised was not raised in the courts below and cannot now be raised on petition for certiorari. *Weber v. Opera On Tour, Inc., 314 U.S., 615.*

The contention (page 6 of petitioner's brief) that the time consumed by the administrative proceedings should not be "charged" against any period of limitation is without merit. An administrative proceeding is not a judicial proceeding and there is nothing in the Walsh-Healey Act that gives the slightest ground for claiming that the statute of limitation is tolled while the administrative proceeding is in progress. It is as clear from the Act itself that the statute is not tolled while the administrative proceeding is in progress as it is that the administrative proceeding is not a prerequisite to institution of suit in court.

In any event the contention of the petitioner that the statute of limitations is tolled pending completion of the administrative proceedings does not apply to the case at bar, No. 293, United States of America, Petitioner v. Lance, Inc., because the administrative proceedings were not instituted until more than two years after the alleged violations. The latest violation alleged against Lance, Incorporated was May 24, 1945 and the Secretary of Labor did not start his administrative proceeding until February 28, 1948 and his "decision became final" according to the complaint on April 26, 1949. The suit was started in the District Court of the United States on September 7, 1949.

The contention of the petitioner beginning with the paragraph numbered 3 on page 7 to the effect that an administrative decision under the Walsh-Healey Act "is an indispensable prerequisite to judicial decision" was fully argued in the original petition for certiorari, pages 4-7 inclusive, and pages 16-22 inclusive, and in the respondent's brief in opposition to the petition for certiorari, pages 8-12 inclusive. The cases cited by the petitioner in

the petition for rehearing were not cited in the petition for certiorari but it is clear that they are not applicable because in the statutes involved in all of these cases any person having a claim under the statutes was expressly given a choice of remedies, either administrative or judicial, which were mutually exclusive. There is no similarity between the situations presented in those cases and in the case at bar and this would seem to be conceded by the petitioner when it admits on page 8 of its brief that one of the remedies provided in the statutes involved in the cases it cited was available, but not both.

We regret that Counsel for the Labor Department and the Solicitor General have interpreted the Portal-to-Portal Act to mean that instead of requiring the department to be a little more timely in its enforcement they must adopt entirely new procedures.

It is respectfully submitted that the petition for rehearing should be denied.

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17

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LOVKNIT MANUFACTURING CO., INC.

MOTION ON BEHALF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON PETITION FOR REHEARING OF ORDERS DENYING PETITIONS FOR WRITS OF CERTIORARI.

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MOTION ON BEHALF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON PETITION FOR REHEARING OF ORDERS DENYING PETITIONS FOR WRITS OF CERTIORARI.

This motion is filed* on behalf of the movant organization, whose interest in the questions before the Court stems from the direct interest of the members of its affiliated unions in the enforcement of the Walsh-Healey Act. The interest in the Act of the unions affiliated with the CIO has been expressed by the large part these unions have played in the proceedings to fix the "prevailing minimum wages" which are required to be paid by the Act. The members of these unions—the employees of those who contract with the Gov-

* The Solicitor General has stated that in accordance with his usual practice, he does not consent to the filing of a brief by movant as *amicus curiae*.

ernment—are the persons intended to be benefited by the Act. These employees are, indeed, the real parties in interest in the usual Government suit under the Act, for by Section 2 (49 Stat. 2036, 2037, 41 U.S.C. Sec. 36), the employee who has received less than the prescribed minimum wage, "on whose account such sums were withheld or recovered" by the Secretary of Labor, is entitled to be paid his share by the Secretary.

The minimum labor standards imposed by the Walsh-Healey Act are an indicia of the essential decency of our civilization. We will not permit goods to be made for the public use by child laborers or by workers who are paid less than the wage deemed a minimum for similar, healthful employment. Because it is a public mandate, however, the inevitable conditions of Governmental action must obtain. Due process requires a careful investigation, a judicious hearing with full rights to be heard, and findings of the facts of the violation by governmental hearing officers. Because, too, the entire body of industry produces for the Government, the area in which violations may take place is gigantic, with the consequence that time is again added to the process of investigation and adjudication of violation.

The administrative system, created and perfected by the expertise of the Department of Labor over the years, is the safeguard of the rights of the Government and of the millions of workers employed in the production of goods for the Government. The decisions below, if not reviewed, will disrupt the machinery of the Secretary of Labor for the orderly enforcement of the rights and duties created by the Walsh-Healey Act. Only from the most unrealistic understanding of industrial operations can it be suggested that the cause of action for violations of the Act accrues mechanically on the day of employment and that action can be brought without administrative proceedings and findings, as hastily as the Government may be required to bring an action for a blunt and open refusal to pay a deficiency assessed by the Commissioner of Internal Revenue.

The consequences wrought by the decisions below are of compelling importance to those intended to be benefited and

protected by the Act. We respectfully submit that such issues can be decided only by this Court and that the undersigned should be given an opportunity to present a brief, from the point of view of the unions affected, on the reasons why this Court should grant a hearing by granting the pending petition. Those unions represent the largest body of employees sought to be protected by the Act.

Respectfully submitted,

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December, 1951.